

ORIGINAL

BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 98-158  
Table of Allotments, ) RM-9342  
FM Broadcast Stations. )  
(Grants and Peralta, New Mexico) )

To: Chief, Allocations Branch

**REPLY TO**  
**COMMENTS OF REGENTS OF THE UNIVERSITY OF NEW MEXICO**

Educational Media Foundation ("EMF"), permittee of noncommercial educational FM Station KQLV, Channel 288C, Grants, New Mexico (FCC File No. BPED-961118MA), by its undersigned attorneys, hereby replies to the Comments filed in this proceeding by Regents of the University of New Mexico ("UNM"). UNM claims that the public interest could be better served if EMF proceeded toward construction of KQLV at its authorized site. As EMF pointed out in both its Petition for Rule Making and its Comments in this proceeding, however, EMF may not commence construction until the United States Forest Service redesignates the transmitter site from low to high power usage, a process that EMF has been told would likely take a *minimum* of two years. The public interest will not be served if service is delayed for more than two or more years and perhaps indefinitely. Accordingly, EMF's reallocation request should be promptly granted.

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### **Background**

On November 18, 1996, EMF and six other applicants filed applications for authority to construct a new FM station on Channel 288C at Grants, New Mexico.<sup>1</sup> EMF's application specified a transmitter site on Mount Taylor in New Mexico. Prior to filing its application, EMF requested and obtained permission from AT&T, the tower owner, to use the tower on the site. On January 7, 1998, EMF entered into an Auction and Settlement Agreement with the other competing applicants pursuant to which EMF emerged as the winning bidder. Thereafter, EMF obtained permission from AT&T to increase the height of the tower by 37 meters so that EMF could increase the height above average terrain of its antenna. EMF and AT&T cooperated in obtaining estimates on the cost of the construction, and on April 28, 1998, EMF filed an amendment reflecting this change. On May 11, 1998, the Commission granted EMF a construction permit for the Grants station.

Upon making final inquiries concerning the need for any governmental authorization prior to commencement of construction of the tower addition, EMF learned for the first time that the AT&T tower was on land that was part of the Cibola National Forest; thus, not only would permission from the Forest Service be required for additional construction on the tower but also for any high power usage of the site. Specifically, EMF was informed that the site would have to be redesignated from low to high power usage in order for EMF to construct its FM facility there, a process that the Forest Service estimated would take a minimum of two years. Moreover, in ongoing talks with the Forest Service, EMF learned that a successful outcome to the redesignation process was *not guaranteed* and that Mount Taylor is a sacred site to four area

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<sup>1</sup>EMF was the only applicant to request authority to operate the station as a noncommercial educational FM station. The other applicants specified commercial facilities.

Native American tribes, whose objections to redesignation of the site would be taken into account in the redesignation process. *See* attached Declaration of Richard Jenkins. After EMF learned of the power limitations on use of the Mount Taylor site, it attempted to locate an alternate tower facility that would allow it to serve Grants with the same allotment, but was unable to do so.

### **Discussion**

UNM argues that Peralta does not deserve a first local service preference because of its proximity to the Albuquerque Urbanized Area. As EMF demonstrated in its Comments, however, Peralta is not interdependent with Albuquerque. As the Commission has recognized, interdependence is the most important factor in the determination of whether a first local service preference is warranted. *See Faye and Richard Tuck*, 3 FCC Rcd 5374, 5378 (MMB 1988).

Moreover, even if Peralta does not warrant a first local service preference, other public interest matters establish that EMF's proposal should be granted. UNM claims that its opposition to EMF's proposal is motivated by a concern about the delay in institution of radio service to Grants. *See* UNM's Comments at 8. As EMF has demonstrated, however, prompt initiation of service consistent with the existing Grants construction permit is impossible since, prior to commencement of construction, EMF must convince the Forest Service to redesignate the site to high power usage, a lengthy process with respect to which a favorable outcome is far from certain. On the other hand, should the Commission reallocate Channel 288C1 to Peralta and modify EMF's license to specify operation on that channel, EMF would be able to immediately commence construction of the Peralta facility and serve that community. Moreover, should the Commission allot Channel 244C3 to Grants, EMF (or whoever may be the winning bidder for the new allotment) would be able to promptly initiate a new service to Grants. The permittee of

a Class C3 facility at Grants would have greater flexibility in choosing a transmitter site because the facility would not require a minimum 300 meter height above average terrain and, thus, would not be required to locate the transmitter on the Forest Service site. In fact, EMF has located one such site, which would be suitable for a Class C3 facility, at 35-16-45 N, 107-58-01 W and has confirmed its availability with the site developer.<sup>2</sup> Implementation of EMF's proposal would be far more efficient than an attempt at redesignation of the current Forest Service site.

Furthermore, UNM's purported concern regarding the impact of EMF's proposal on noncommercial radio service in the Albuquerque area is misplaced. As UNM points out, EMF has an application pending for a new noncommercial educational FM station at Peralta on Channel 213 (FCC File No. BPED-961024MD).<sup>3</sup> No Commission rule, however, prevents EMF from pursuing the KQLV reallocation as well as its application for a new station at Peralta. At any rate, that application is one of five mutually exclusive applications, and EMF's chances of being the prevailing applicant are speculative at this point.<sup>4</sup> Moreover, the Commission recently released a *Further Notice of Proposed Rule Making* requesting comment concerning the Commission's adoption of comparative criteria for noncommercial educational applicants. *See In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational*

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<sup>2</sup>The site is short-spaced to the construction permit of KDAG(FM), Farmington, New Mexico, but could be allotted consistent with Section 73.215 of the Commission's rules.

<sup>3</sup>UNM also points to EMF's pending applications for FM translator stations at Sandia and Placitas, New Mexico (FCC File Nos. BPFT-970902TJ and BPFT-970902TH). Once again, it is unclear what point UNM is trying to make. The existence of these applications merely demonstrate EMF's commitment to serve various New Mexico communities and do not prejudice UNM in any way.

<sup>4</sup>The other applications are: BPED-970313IE, BPED-970312MB, BPED-970313MB and BPED-970313MG.

*Applicants*, MM Docket No. 95-31 (released October 21, 1998). Thus, it will be some time before the proceeding involving EMF's pending Peralta application can be resolved. In these circumstances, UNM's assertion that this mutually exclusive situation may impact EMF's proposed reallocation of KQLV(FM) is unfounded.

In sum, EMF would immediately commence construction of the Grants facility on its Channel 288C and promptly commence broadcasting if only it could. Absent its pursuit to a successful conclusion of the Forest Service's redesignation process, however, that is not possible. The public interest will not be served by requiring EMF to go through this lengthy and costly process that could very well end with the Forest Service's refusal to permit EMF to operate the Grants facility at (or even near) its authorized power.

For the foregoing reasons, EMF urges the Commission to adopt the *NPRM*'s proposal to substitute Channel 288C1 for Channel 288C at Grants, New Mexico, to reallocate Channel 288C1 to Peralta, New Mexico, and to allocate Channel 244C3 to Grants. If the Commission adopts EMF's proposal, EMF will expeditiously file the appropriate application to implement the KQLV facilities at Peralta. EMF will also file a Form 301 application for Channel 244C3 at Grants when the Commission opens a window and if authorized, will proceed promptly with the construction and operation of the new station.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

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Dated: November 17, 1998

### **DECLARATION OF RICHARD JENKINS**

I, Richard Jenkins, President of Educational Media Foundation, hereby declare under penalty of perjury that I have reviewed the exact contents of the foregoing Reply to Comments of Regents of the University of New Mexico, and except for facts of which official notice may be taken, the facts set forth therein are true and complete to the best of my knowledge, information and belief.

This Declaration is signed this 17th day of November, 1998 under penalty of perjury under the laws of the United States.

A handwritten signature in dark ink, appearing to be 'Richard Jenkins', written over a horizontal line.


Richard Jenkins, President

**CERTIFICATE OF SERVICE**

I, Renee Williams, hereby certify that I have on this 17th day of November, 1998 caused a copy of the foregoing **“REPLY TO COMMENTS OF REGENTS OF THE UNIVERSITY OF NEW MEXICO”** to be served by first class U.S. mail, postage prepaid, upon the following:

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Renee Williams

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